No. 14-275

SUPREME COURT, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The Federal Circuit Bar Association ("FCBA") is a national bar association with more than 2600 members from all geographical areas of the country, all of whom practice before or have an interest in the decisions of the Court of Appeals for the Federal Circuit, and in decisions from this Court and other courts that address issues within the Federal Circuit's subject matter jurisdiction. The FCBA provides a forum for common concerns and dialogue between the bar and judges of the Federal Circuit. One of the FCBA's purposes is to offer assistance and advice to the federal courts, including briefs *amicus curiae*, on matters affecting practice before the Federal Circuit and other tribunals that address comparable subject matter.[1]

A great many FCBA members practice takings law, which falls within the Federal Circuit's jurisdiction. The FCBA and its members therefore have a keen interest in the proper application of the Fifth Amendment Takings Clause, and in this case, which presents important takings issues. The FCBA and its members are particularly

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1. All parties to this matter have granted blanket consent for amicus curiae briefs in support of either or neither party. The plaintiffs-appellants below, petitioners here, filed such consent on February 24, 2015. Defendant-appellee below, respondent here, the United States Department of Agriculture, filed such consent on February 27, 2015. The requirements of Rule 37.2(a) of the rules of this Court are satisfied by these filings.

Pursuant to Supreme Court Rule 37.6, the FCBA states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

concerned by the Ninth Circuit's holding that would entirely deny important Takings Clause protections to personal property—potentially including patents and contracts, which regularly come before the Federal Circuit and in which FCBA members and their clients have great interest.

INTRODUCTION

The Ninth Circuit held in this case that a federal regulatory requirement that petitioners (collectively "Horne") deliver a substantial portion of their annual raisin crop to a federal administrative body did not constitute a compensable taking. Of the several reasons the Ninth Circuit offered for that conclusion, one was particularly fundamental: that "the Takings Clause affords less protection to personal than to real property." Pet. App. at 18a. Relying on that distinction, the Ninth Circuit concluded that the requirement that the Hornes deliver their raisins to the administrative body did not fall within the scope of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that permanent physical invasions of property work a *per se*, or "categorical" taking. *Id.* at 17a-20a. In other words, the Ninth Circuit would limit that *per se* rule to real property. *Id.*

The FCBA focuses this brief on the real/personal property distinction drawn by the Ninth Circuit. That distinction is contrary to this Court's longstanding reluctance to draw bright lines in takings cases, and has unsettling implications for takings jurisprudence that extend well beyond the circumstances of this case.[2]

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2. The other two questions presented for review in this case implicate issues of administrative law and policy that are not

SUMMARY OF ARGUMENT

The bright line the Ninth Circuit drew between real and personal property has no basis in the language of the Takings Clause, which protects "property" generally, and no place in this Court's takings jurisprudence. The Court has frequently cautioned against drawing bright line rules in takings cases, except in two circumstances: the *Loretto* situation, where governmental conduct leads to a physical intrusion on private property, and the situation presented in *Lucas v. South Carolina Coastal Council*, 505 U.S.1003 (1992), which held that regulation that eliminates all economically viable use of property also constitutes a *per se* taking. There is no reason in principle to limit either of these "categorical" rules to real property, and good reasons—including this Court's caution against bright lines in takings cases—not to subdivide the *Loretto* or *Lucas* rules by categorically excluding personal property from their purview.

Erecting a categorical distinction between real and personal property is particularly untenable, and unwise, because much property does not fall neatly into either category. Intangible property in particular—including patents and contracts, in which the Federal Circuit and the FCBA have a special interest—bears little resemblance to either real estate or raisins. Yet this Court has long held that both patents and federal contract rights are "property" protected by the Takings Clause, and there

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squarely within the Federal Circuit's jurisdiction. In addition, the FCBA believes that reversal on the real/personal property issue should largely decide this case because this Court's precedents involving real property provide firm guidance toward resolution of the other two questions presented.

has never been any question that federal appropriation of either patent rights or federal contracts rights works a taking. *See James v. Campbell*, 104 U.S. 356 (1881) (patents); *Lynch v. United States*, 292 U.S. 571 (1934) (contracts). There should likewise be no question that the full protection of the Takings Clause, including the categorical rules this Court upheld in *Loretto* and *Lucas* and other core principles of takings jurisprudence, extends to all forms of the "property" addressed in that Clause, whether real or personal, tangible or intangible.

ARGUMENT

I. The Ninth Circuit's Bright Line Distinction Between Personal And Real Property Is Contrary To The Takings Clause And To This Court's Takings Jurisprudence.

As the Hornes demonstrate, *see* Brief for Petitioners ("Pet. Br.") at 31-39, personalty has been recognized as among the "property" protected by the Takings Clause since the founding of the Republic, and indeed the uncompensated requisitioning of food and other supplies by military authorities back then was likely an important reason why the Clause was adopted. Not only is there a lack of any textual or historical basis for the distinction between real and personal property drawn by the Ninth Circuit, but with two substantial exceptions this Court has avoided drawing bright line rules in regulatory takings cases, instructing instead that such cases generally require "ad hoc, factual inquiries." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337 (2002) ("In

rejecting petitioners' *per se* rule [based on] the temporary nature of a land-use restriction, . . . we simply recognize that it should not be given exclusive significance one way or the other."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.").

To be sure, the Court laid down bright lines in both *Loretto* and *Lucas*. But those rules reflect the nature of the impact of regulation on property, not the nature of the property impacted. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005) ("[E]ach of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."). There is no reason in principle why the bright line rules of *Loretto* and *Lucas* should be limited to real property. And there are good reasons not to subdivide the *Loretto* or *Lucas* rules by limiting them categorically to real property. Endorsing a new bright line, real/personal property distinction here would invite categorical application of that bright line rule to limit other takings principles to only real property cases or only personal property cases, contrary to this Court's recognition that what determines the scope of Takings Clause protection is the impact of regulatory action on property and not the type of the property impacted.

Loretto reaffirmed the rule, long-recognized in this Court's previous cases, that a taking unquestionably occurs—"*per se*"—when government action directly appropriates or causes a physical invasion property. As the Court explained in *Loretto*, "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' . . . To the extent that the

government permanently occupies physical property, it effectively destroys *each* of those rights." 458 U.S. at 435. Because such physical takings are recognized to be "perhaps the most serious form of invasion of an owner's property interests," *id.* at 435, *Loretto*'s categorical rule applies "however minor" the physical invasion. *Lingle*, 544 U.S. at 538.

Nothing in the rationale the Court expressed for the *per se* rule in *Loretto* supports, or even suggests, excluding personal property from its reach. The physical appropriation the government demands in this case destroyed the Horne's rights to possess, use and dispose of their raisins no less than the cable box on the rooftop of Loretto's apartment building invaded her right to exclusive use and enjoyment of her property. In fact, the physical confiscation of property required by the regulatory scheme in this case is an even more direct physical invasion by the government than in *Loretto*. There, unlike here, the New York statute left the property owners in possession of their buildings and only required them to allow other private parties (the cable companies)—not the government itself—to invade their property.

The Court in *Loretto* explicitly recognized that the very purpose of a *per se* rule is to apply across the board. It observed that the "traditional rule" that a physical invasion by the government is a *per se* taking "avoids otherwise difficult line-drawing problems." 458 U.S. at 436. The example the Court gave involved the nature of the impact on the property the government invaded, not the nature of the property invaded. The Court explained that application of the rule that physical invasion is a *per se* taking avoids judgments based on how much (or little)

space the government is occupying. In the present case, the government has confiscated the Horne's raisins in their entirety. It would be entirely inconsistent with *Loretto* to approve a bright line excluding personal property from the *per se* rule that such an invasion is a taking. In sum, there is no reason and no basis and no precedent for limiting the *Loretto* rule to real property, and the Ninth Circuit was wrong to do so. *See id.* at 434 ("[O]ur cases have uniformly found a taking to the extent of the occupation.").

Lucas focused on a different *per se* rule, which applies when government regulation denies "*all* economically beneficial uses" of property, *Lucas*, 505 U.S. at 1019, but the underlying rational for that rule is the same: "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1018. *See Lingle*, 544 U.S. at 540 (Noting the "common touchstone" that underlies *Loretto* and *Lucas*; "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.").

As with the *Loretto per se* rule, nothing in that rationale —which the Court offered in *Lucas* and reiterated in *Lingle*—warrants excluding personal property from the reach of the *Lucas* rule. Government action can eliminate "all economically beneficial or productive use" of personal property no less than of real property. If it does, then just as in the case of real property, the "total deprivation" is, from the property owner's perspective, "the equivalent of a physical appropriation." *See Lucas*, 505 U.S. at 1018. In fact, in a *dictum* addressing facts not present in *Lucas*, the Court acknowledged this very possibility: "[i]n the case of

personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* at 1027-28. The Court then proceeded to address the real property that was involved in *Lucas*, rejecting the State's contention that "title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically viable use." *Id.* at 1028.

Citing these two passages, the Ninth Circuit asserted that "*Lucas* uses comparative language to make clear the Takings Clause affords more protection to real than to personal property." Even if that were true, it would provide no basis for concluding that the *per se* rule of *Lucas* rule is categorically inapplicable to personal property. In the present case the Ninth Circuit does not explicitly go that far, concluding only that its reading of *Lucas* supports its refusal to apply *Loretto's per se* rule to personal property. Pet. App. at 20a ("Given the Court's later discussion of personal property in *Lucas*, we see no reason to extend *Loretto* to govern controversies involving personal property."). Still, the Ninth Circuit's troublingly clear implication is that the "comparative" language it cited from *Lucas* may require a finding that personal property as a category is not protected by the *per se* rule of either *Loretto* or *Lucas*.

The Ninth Circuit misconstrues the passages it cited from *Lucas*. What this Court was discussing there was not any difference in the nature of real versus personal property that would result in different consequences when regulation eliminates all economic value of each

type of property. Instead, the Court in *Lucas* was addressing an important principle concerning the nature and consequences of regulatory impacts on property. Specifically, the Court was exploring the significance in a takings case of "limitations that inhere in the title [to property] itself," arising from "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. As the Court explained, "to win its case South Carolina . . . . must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id.* at 1031.

Nothing in *Lucas* supports the conclusion that this "nuisance exception" to takings liability, as some have called it, should not apply equally to personal property. Instead, the "comparative language" the Ninth Circuit cited from this Court's *Lucas* opinion was simply a recognition that different "background principles of nuisance and property law" may be relevant to real and personal property, owing to "the State's traditionally high degree of control over commercial dealings." 505 U.S. at 1027. Of course, federal and state land use authorities also exercise a high degree of control over development and other uses of real property. Therefore, differences between how background principles of property law may affect the impact of regulation on real versus personal property need to be explored case by case, not by entirely excluding personal property—because of its nature—from the reach of *Lucas*'s *per se* rule. *See Palazzolo*, 533 U.S. at 626-30 (Explaining that the mere existence of a regulatory scheme that might eventually limit or even deny productive use of property does not *per se* negate Takings Clause

protection for that property). Here again, there is no reason and no basis and no precedent for limiting the *Lucas* rule to real property, and even though the Ninth Circuit did not go that far in this case, the Court should make that clear.

II. This Court's Decisions Conferring Takings Clause Protection On Intangible Property Like Patents And Contracts Confirms That Different Types Of Property Should Not Be Treated Differently In Takings Cases.

In addition to being unfounded, the distinction the Ninth Circuit drew between real and personal property is entirely unhelpful in assessing the consequences of governmental impacts on private property, which is the touchstone of takings liability. That is particularly so in the realm of intangible property, and is another good reason to reject the real/personal property distinction.

Intangible property, like the patents and contracts that frequently come before the Federal Circuit, is oftentimes classified as personal property. But intangible property is typically impacted by government conduct in ways that differ from impacts on tangible personal property. To put it starkly, the government cannot physically invade a patent or a contract. Yet this Court has squarely held that both patents and contracts, as well as other types of intangible property, are fully protected by the Takings Clause from confiscation or elimination of their value by the government.

Those decisions further confirm that it is the impact of government conduct on property, and not the nature

or form of the property, that controls the application of Takings Clause principles. This includes the application to intangible property of what amount to *per se* rules when such property is appropriated or rendered valueless. Because many of the Court's intangible property takings cases predated *Loretto* and *Lucas*, they do not apply the "*per se*" label popularized by those decisions. But this Court's relevant precedents involve *per se* takings nonetheless, not because of the nature of the intangible property involved, but because of the same destructive impact of government conduct on property that was present in *Loretto* and *Lucas*.

As long ago as *James*, 104 U.S. 356 , the Court stated that it had "no doubt" that patents enjoyed the same constitutional protection as real property. The Court explained that a patent "cannot be appropriated or used by the government itself, without just compensation any more than it can appropriate or use without compensation land which has been patented to a private purchaser." *Id.* at 358. Reflecting the distinctive nature of patents (as well as other forms of intangible property), appropriation in this context does not necessarily mean that the government acquires title to a patent, but also includes the government's use of a patented invention. That is because a patent holder's property rights include the right to *exclusive* use of the invention. *See* U.S. CONST., art. I, § 8, cl. 8; *see* 35 U.S.C. § 271. When the government uses a patent without a license it destroys that exclusive right, and becomes liable to pay compensation. That is so clear and well-settled that the government long ago enacted a statute requiring compensation to patent holders whenever the government without a license uses or authorizes a contractor to use a patent. 28 U.S.C. § 1498;

see Richmond Screw Anchor Co., Inc. v. United States, 275 U.S. 331 (1928). As the Court instructed in *James*, the government thus recognizes that its unauthorized use of a patent *per se* requires compensation.[3]

This Court recognized a *per se* taking of trade secrets, another form of intangible property, in *Ruckelshaus v. Monsanto Company*, 467 U.S. 986(1984). There the Court held that EPA's use or disclosure to others of certain trade secret data was a taking, explaining that "[w]ith respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute the trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data." *Id.* at 1011. Another example of a *per se* taking of intangible property rights, although again without benefit of that later-coined label, is *Armstrong v. United States*, 364 U.S. 40 (1960). There the Court found a taking of materialman's liens when the underlying property was transferred to the government, thereby erecting a sovereign immunity bar to enforcement of the liens. As the Court recognized, "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking.'" *Id.* at 48. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*,

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3. The Federal Circuit's predecessor, the Court of Claims, likewise recognized long ago that the government's unauthorized use of a patent constitutes a taking. *Pitcairn v. United States*, 212 Ct. Cl. 168, 180 (1976) ("The use or manufacture by or for the Government of a device or machine embodying any invention protected by a United States patent, is a taking of property by the Government under its power of eminent domain. The nature of the property thus taken is a license in the patent.).

449 U.S. 155, 164 (1980) (Addressing a taking of money, another form of intangible property: "a State, by *ipse dixit*, may not transform private property into public property without compensation.").

Turning finally to contract rights, yet another species of intangible property, the Court held in *Lynch*, 292 U.S. 571, that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* at 578. Although that case was remanded, the Court left no doubt that for Congress "[t]o abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation." *Id.* at 581. *See Perry v. United States*, 294 U.S. 330, 350-51 (1935). The Court more recently has avoided confronting the constitutional consequences of an outright government repudiation of one of its contracts by making clear that contract damages, the traditional "default remedy" for breach, is available when the government dishonors one of its contracts, even by a change in law. *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996). Still, *Lynch*'s recognition that rights under government contracts are constitutionally-protected property makes clear that an outright repudiation should be viewed as no less destructive of those rights—and thus no less a *per se* taking -- than a physical invasion or the elimination of all value of tangible property, whether real or personal.

* * * *

Were the Ninth Circuit's bright line distinction between real and personal property to be accepted, it would have unsettling implications not only for the scope of protection provided by the *per se* rules of *Loretto* and *Lucas*, but also

for the application of the principles embodied in those *per se* rules to intangible property like patents and contracts, and other forms of "property" that may defy ready categorization. *See, e.g., Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1991) (Finding a taking of Yanceys' healthy turkey flock because a quarantine imposed by the government "prevented the interstate sale of their [live]stock and thereby destroyed its economic value"). This Court's decisions show that there is no basis and no reason for any bright line rule between real and personal property, or between other property types, whether tangible or intangible. If distinctions are to be drawn in takings cases, they should be based on the nature of the governmental impact on property, not the nature of the property impacted.

CONCLUSION

The Court should make clear that the rule of *Lorreto* applies in this case and reverse the court of appeals.

Respectfully submitted,

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March 9, 2015